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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO SALINAS, Defendant and Appellant.	2d Crim. No. B223332 (Super. Ct. No. BA288385) (Los Angeles County)

Antonio Salinas appeals the judgment entered after a jury convicted him of second degree murder (Pen. Code,[1] §§ 187, 189) as a lesser included offense of first degree murder. The jury also found true allegations that appellant had caused the victim's death by personally and intentionally discharging a firearm (§ 12022.53, subd. (d)) and had served a prior prison term (§ 667.5, subd. (b)). The trial court sentenced him to a total term of 41 years to life in state prison. He contends the court erred in giving jury instructions on mutual combat (CALCRIM No. 3471) and contrived self-defense (CALCRIM No. 3472). We affirm.

STATEMENT OF FACTS

On the night of July 30, 2005, appellant and Alfonso Moreno were standing near Moreno's apartment when appellant was approached by his cousin, Benacio

[1] All further undesignated statutory references are to the Penal Code.

Valentine.[2] Valentine was highly intoxicated and began arguing with appellant. The two men stood about three feet apart and raised their fists as if they were about to fight, but no punches were thrown. Valentine told appellant, "I'm fed up with you" and said "let's fucking fight." Appellant and Valentine moved away from Moreno when he tried to step between them. Appellant pulled a gun out of his waistband, shot Valentine in the chest, and fled the scene. Valentine was transported by ambulance to the hospital, where he died. Several eyewitnesses to the incident later identified appellant as the shooter.

DISCUSSION

Appellant's sole contention on appeal is that the court erred in instructing the jury on mutual combat and contrived self-defense, as provided in CALCRIM Nos. 3471[3] and 3472.[4] He contends the instructions should not have been given because there was no evidence that he had provoked the fight with the victim or that the two of them had engaged in mutual combat. The People counter that appellant invited the error with regard to the giving of CALCRIM No. 3471, and forfeited his right to challenge

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[2] In his trial testimony, Moreno referred to appellant and Valentine by their respective nicknames, "Whisper" and "Loco."

[3] CALCRIM No. 3471 as given states: "A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if: [¶] 1. He actually and in good faith tries to stop fighting; [¶] AND [¶] 2. He indicates, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wants to stop fighting and that he has stopped fighting; [¶] AND [¶] 3. He gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim of self-defense arose. [¶] If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting."

[4] CALCRIM No. 3472 provides in pertinent part: "A person does not have the right to self-defense if he provokes a . . . quarrel with the intent to create an excuse to use force."

CALCRIM No. 3472. The People further assert that the instructions were supported by substantial evidence, and that any error in giving them was harmless.

The People's claim that appellant invited any error occasioned by CALCRIM No. 3471 is premised solely on the fact that the judicial council form instruction contains a handwritten "X" in the box indicating that it was requested by the defendant, while the form instruction for CALCRIM No. 3472 contains an "X" in the box indicating a request by the prosecution. The record does not, however, include any discussion regarding the instruction. Moreover, CALCRIM No. 3471 is inconsistent with appellant's defense theory that he was guilty of no more than voluntary manslaughter because he shot the victim while in the heat of passion and acted in *imperfect* self-defense. As the prosecutor told the jury in his rebuttal argument, "[y]ou notice [defense counsel] did not argue to you that this was done in self-defense. It just does not make sense." Because there was no discussion regarding CALCRIM No. 3471 and the instruction was inconsistent with appellant's defense, the notation indicating that he requested the instruction is insufficient to support the conclusion that he invited the alleged error of which he complains. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 330, overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201 [invited error applies only when the record affirmatively shows "that counsel acted for tactical reasons and not out of ignorance or mistake"]; *People v. Cooper* (1991) 53 Cal.3d 771, 830 [quoting same].)[5]

Appellant does not dispute, however, that he did not object to either CALCRIM No. 3471 or CALCRIM No. 3472. Accordingly, his claims are forfeited

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[5] A comment made during the discussion on instructions provides support for the appellant's assertion that the notation identifying him as requesting CALCRIM No. 3471 was simply a clerical mistake. In reciting the order in which the instructions were to be given, the court stated that it was "mov[ing]" CALCRIM No. 3471 to follow the instruction on imperfect self-defense (CALCRIM No. 571) because the court "thought it would be a better place for it." The prosecutor responded, "[t]hat's fine," while defense counsel did not comment at all. This exchange supports the inference that the instruction was actually given at the request of the *prosecutor*, and not defense counsel.

unless it can be said that the instructions affected his substantial rights, i.e., resulted in a miscarriage of justice. (*People v. Christopher* (2006) 137 Cal.App.4th 418, 426-427.) Although we agree that the instructions should not have been given, appellant fails to demonstrate that the error in doing so resulted in a miscarriage of justice.

"A party is entitled to a requested instruction if it is supported by substantial evidence. [Citation.] Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] At the same time, instructions *not* supported by substantial evidence should not be given. [Citation.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]'" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.)

The instructions on mutual combat and contrived self-defense should not have been given because they simply did not apply to the facts of the case. Appellant never claimed that he had acted in lawful self-defense, and there was no evidence from which the jury could have found he had done so. With regard to CALCRIM No. 3471, there was no evidence that appellant ever attempted to withdraw from the fight, much less convey to the victim that he was doing so. The record is also devoid of any evidence that the victim acted with "such sudden and deadly force" that appellant could not withdraw. Indeed, it is questionable whether the two men were even engaging in "mutual combat" when the shooting occurred, for no blows were ever exchanged. As for CALCRIM No. 3472, the uncontroverted evidence showed that it was the *victim* who had provoked the quarrel, not appellant.

Because the principles of mutual combat and contrived self-defense had no application to the facts of this case, CALCRIM Nos. 3471 and 3472 should not have been given. We conclude, however, that the error was harmless. Appellant's argument to the contrary is premised on the notion that the instructions "acted to deprive [him] of his right to claim imperfect self-defense." We disagree. The jury was instructed on imperfect self-defense (CALCRIM No. 571), and was also told that some of the instructions might

not apply under the facts of the case. Moreover, neither of the instructions at issue was referenced during closing argument. Although appellant notes the prosecutor's statement that defense counsel had not relied on self-defense in her closing argument, that statement was accurate and defense counsel did not object. To the extent appellant claims that the jury may have been misled into believing that appellant could not be found guilty of voluntary manslaughter on the theory that he had acted in *imperfect* self-defense, the instructions plainly provided to the contrary. We presume the jurors took those instructions into consideration in reaching their verdict. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005; *People v. Crandell* (1988) 46 Cal.3d 833, 872-873, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365 [harmless error in giving CALJIC No. 5.55 (now CALCRIM No. 3472): "[W]e are confident the jury was not sidetracked by the correct but irrelevant [self-defense] instruction, which did not figure in the closing arguments, and we conclude that the giving of the instruction was harmless error"]; see also *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381 [quoting same].)

Appellant's assertion that the inapplicable instructions may have led the jury to "speculate" as to facts that did not exist finds no support in the record. Appellant fails to show a reasonable probability that he would have achieved a more favorable result had the instructions not been given, so the error in giving the instructions was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Ross, supra*, 155 Cal.App.4th at pp. 1054-1055 [error in giving CALJIC No. 5.56 (now CALCRIM No. 3471) reviewed under *Watson* harmless error standard of review].) Because it is evident that the instructions played no part in the jury's deliberations and did not serve to deprive appellant of a valid defense, the error was also harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) It necessarily follows that the instructions did not result in a miscarriage of justice. Accordingly, appellant's claim of

instructional error is forfeited. (*People v. Christopher, supra,* 137 Cal.App.4th at pp. 426-427.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

David S. Wesley, Judge

Superior Court County of Los Angeles

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

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